Supreme Court, U.S.
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No 86-275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, and LEONARD A. DAVID,

Petitioners,

-against-

STUART STEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 19, 1986.

QUESTION PRESENTED

Whether an employee of a private bus company that has a contract with petitioner Board of Education of the City of New York to transport school children was deprived of due process when the Board, pursuant to its rights under the contract, informed the bus company that the employee no longer would be permitted to drive on the Board's routes and the employee subsequently was fired by the private bus company?

PARTIES

The appellants before the Court of Appeals for the Second Circuit were the Board of Education of the City of New York, Bureau of Pupil Transportation and Leonard A. David. The appellees were Stuart Stein, A.C.J. Transportation Corp. and Anthony DiDomenico.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, and LEONARD A. DAVID,

Petitioners,

-against-

STUART STEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, The Board of Education of the City of New York, Bureau of Pupil Transportation, and Leonard A. David respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 22, 1986, which

reversed the judgment of the District Court entered January 24, 1986 and remanded the matter for a new trial on the issue of damages. In affirming the liability of the petitioners, the Court of Appeals found that respondent Stuart Stein had a legitimate claim of entitlement to his continued employment with a private bus company and that his disqualification as a school bus driver by petitioners was state action which deprived him of that protected interest.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 792 F.2d 13 (2d Cir. 1986). A copy is annexed as Appendix A. The opinion of the United States District Court for the Eastern District of New York which denied petitioners' motion for summary judgment is not reported. A copy is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was dated and entered May 22, 1986. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N. Y. EDUC. LAW § 3624 (McKinney 1981) provides:

The commissioner shall determine and define the qualifications of drivers and shall make the rules and regulations governing the operation of all transportation facilities used by pupils which rules and regulations shall include, but not be limited to, prohibitions relating to smoking, eating and drinking and any and all other acts or conduct which would otherwise impair the safe operation of such transportation facilities while actually being used for the transport of pupils. The employment of each driver shall be approved by the chief school administrator of a school district for each school bus operated within his district. For the purpose of determining his physical fitness, each driver may be examined on order of the chief school administrator by a duly licensed physician within two

weeks prior to the beginning of service in each school year as a school bus driver. The report of the physician, in writing, shall be considered by the chief school administrator in determining the fitness of the driver to operate or continue to operate any transportation facilities used by pupils.

STATEMENT OF THE CASE

(1)

Petitioner Board of Education of the City of New York, Bureau of Pupil Transportation ("the Board") provides transportation to and from school for all handicapped children and other school children in New York City who live a prescribed distance from their schools. The Board has contracted with approximately 135 private bus companies to provide these transportation services (CA. 305)[1]

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[1] References preceded by "CA" are references to the joint appendix filed in the Court of Appeals.

In June 1979, A.C.J. Transportation Corporation ("ACJ") was awarded a contract to provide transportation for handicapped children to and from school. ACJ's exclusive business is the transporting of school children pursuant to its contract with the Board, a fact that the Director of Contract Compliance at the Board was unaware of (CA. 357). The contract does not require the bus company to limit its business to the Board's routes. Pursuant to the contract, the Board can, at any time, increase or decrease the number of vehicles and the drivers it requires and even cancel the contract. (CA. 740, CA. 776).

ACJ, like all bus companies which have contracts with the Board, hires its own employees (CA. 17). In accordance with Section 3624 of the Education Law and the contract itself, all applications for

employment for school bus drivers are sent to the Board and the contractor must certify to the Board that all the applicant's references have been checked and that the applicant is of good moral character (CA. 741-42). The contract provides that "the contractor shall only employ persons of good moral character to serve as vehicle operators" and that if the Board determines that a driver's competency falls below acceptable standards, the bus company upon receiving written notice from the Board, shall not employ the driver to perform any work for the Board under this or any other contract (App. A-5)[2].

(2)

Respondent began working for ACJ as a school bus driver in Fall 1979. Pursuant to

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[2] References preceded by "App." are references to the Appendix to this Petition.

a collective bargaining agreement between ACJ and his union, respondent could not be discharged from employment except for just cause.

After receiving complaints about respondent "exposing himself" and "playing with himself" while on his school bus, the Board notified ACJ that respondent should not be permitted to drive on the Board's routes pending a hearing on these charges.

Notice of the hearing was sent to ACJ with a copy for ACJ to forward to respondent. A hearing was held on April 12, 1982, at which respondent and his union representative were present.

By decision dated April 13, 1982, the Board notified ACJ that a decision had been made to no longer permit respondent to drive on the Board's routes immediately because respondent falls below the standard of "good

moral character" as required by the contract between the Board and ACJ.

Respondent was subsequently discharged from his job with ACJ. Thereafter, respondent filed a grievance against ACJ with his union and the matter went to arbitration (App. B-7). An arbitration hearing was held on the merits of respondent's discharge on September 22 and 23, 1983. Evidence was submitted to the arbitrator attesting to respondent's good character as well as evidence regarding respondent's alleged misconduct. After reviewing the record, the arbitrator denied the grievance.

(3)

In December 1982, respondent commenced the instant action against the petitioners, ACJ and ACJ's president pursuant to 42 U.S.C. § 1983 alleging that he had been deprived of his property

without due process of law in that he did not receive adequate notice of the complaints against him and did not have an adequate opportunity to be heard by petitioners.

Respondent also alleged, as a pendent state claim, that the president of ACJ libeled him. The United States District Court for the Eastern District of New York denied petitioners' motion for summary judgment, finding that respondent had a legitimate claim of entitlement to his employment (App. B-9, B-10).

At trial, the jury was instructed that the respondent's "job is a property interest which is protected by due process of law." (App. C-1). The jury found that although respondent had a full and fair opportunity to be heard, he did not receive adequate notice of the charges against him so as to permit him to prepare a response to them. As to the Section 1983 claim against ACJ and its

president, the jury found that the respondent did not show by a preponderance of the evidence that they conspired with any one at the Board to deprive respondent of his due process rights. With respect to the libel claim, the jury found for ACJ and its president. The jury awarded $15,000 in compensatory damages and the petitioners were directed to hold a new hearing to determine whether or not respondent should be allowed to drive on the Board's routes.

Upon petitioners' appeal, the Court of Appeals found that the contract between the union and ACJ gave rise to a legitimate claim of entitlement to continued employment and that the respondent's "disqualification as a certified bus driver by the Board of Education was state action that deprived him of that property." (App. A-17, A-18) In so holding, the Court stated (App. A-17, A-18):

> We need not reach the broad question whether Stein's certification as a vehicle operator by the Board was itself a property interest protected by the constitutional safeguards of due process . . . . our holding in this case rests on the narrower ground that Stein had a property interest in his continued employment with ACJ.

Although the Court of Appeals agreed with the District Court that respondent had a protected property interest in his job with ACJ, it reversed and remanded the case because the District Court erroneously failed to instruct the jury on the issue of nominal damages (App. A-25).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals extending the application of the Due Process Clause beyond actions by the government which directly affect a protected interest to actions where a consequential loss of a protected interest may result conflicts with the principles set forth by this Court in applicable cases.

(1)

The Court of Appeals for the Second Circuit has construed the Due Process Clause to place constraints not only on actions taken by the state which directly deprive an individual of a protected interest but also on state actions which may result in the consequential loss of a protected interest. A study of the applicable cases

decided by this Court does not support such a construction. This Court in Paul v. Davis, 424 U.S. 693, 710-11, reh'g denied, 425 U.S. 985 (1976) stated:

> These [liberty or property] interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status . . . . In each of these cases, as a result of the state action complained of, a right or status previously recognized by State law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment.

In holding that respondent has a property interest in his continued employment with ACJ and that petitioners deprived him of this interest when petitioners disqualified him from driving on

the Board's routes, the Court of Appeals has mistakenly focused on only one prong of the Due Process Clause, namely, whether a protected interest exists. The Court of Appeals failed to recognize that the government action complained of must relate directly to the deprivation of that interest. Research has uncovered no cases in which this Court has found a due process violation where the terminated entitlement or benefit was not the subject of the state action but merely a consequence or indirect result of state action.

Historically, the Due Process Clause has been implicated only where protected interests are the subjects of state action. See, e.g., Barry v. Barchi, 443 U.S. 55 (1979) (suspension of horse training license); Goss v. Lopez, 419 U.S. 565 (1975) (suspension from public school); Arnett v. Kennedy, 416 U.S. 134 reh'g denied 417

U.S. 977 (1974) (discharge of federal employee); Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits).

In Greene v. McElroy, 360 U.S. 474 (1959) and Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, reh'g denied, 368 U.S. 869 (1961), this Court addressed situations analogous to the one at bar. The petitioner in Greene, supra, was discharged from his employment with a private contractor which did defense work after the United States Department of Defense revoked his security clearance. The petitioner in Greene argued that he was deprived of his property interest in his employment without due process in contravention of the Fifth Amendment. The government contended that

"the admitted interferences which have occurred are indirect by-products of necessary government action to protect the integrity of secret information and hence are not unreasonable and do not constitute deprivations within the meaning of the Amendment." 360 U.S. at 492. This Court, however, having found that there was no statutory authorization for the government's actions, did not reach the constitutional issues in Greene.

In Cafeteria & Restaurant Workers, supra, a cook employed by a private restaurant company working at a naval facility was barred from the facility by order of the commanding officer. This Court found that the cook did not have a constitutional right to notice and a hearing before being barred from the facility.

The Court of Appeals distinguished Cafeteria & Restaurant Workers from the

instant case by noting that the employee in that case had not been discharged by the company and was also free to obtain employment in her field elsewhere. Petitioners submit, however, that the mere fact that a consequential loss of a protected interest may result from government action alone can not implicate the Fourteenth Amendment.

If permitted to stand, the decision of the Court of Appeals potentially will have a monumental effect on the way the state conducts its business. The state will be required to always evaluate what the consequences of its proposed actions will be. For example, although an applicant for a license may not have a protected interest in that license, the State must evaluate whether there will be a consequential loss of a protected interest, such as a job, if the application is denied. In the case of those

public employees who have no protected interest in their jobs, a discharge from that employment can nevertheless result in the loss of all types of recognized property interests, including one's home or car. Finally, in a case where an independent contractor has a contract with the state, if the state attempts to enforce its rights with the independent contractor, as in the case at bar, the state must evaluate whether its actions will have any affect on the protected interests of the contractor's employees.

The above examples illustrate that there is no logical stopping point to the line of reasoning of the Court of Appeals. The range of interests protected by the Due Process Clause and the constraints it places on state action were not intended to be infinite. Thus, the Court of Appeals erred in focusing on the respondent's job with the

ACJ rather than his "certification" to drive on the Board's routes.

(2)

Although the Court of Appeals did not reach the question whether respondent's "certification" as a vehicle operator by the petitioners was itself a property interest, the Court did mistakenly compare "certification" of a driver to work on the Board's routes to licensing of professions by the state. The government function here is not to regulate or license an entire profession or private business. Rather, the Board's "certification" is merely a determination that certain minimum prerequisites or conditions, including good moral character, have been met before a driver can perform the Board's work. It is unlike a license in that there is no finite number of qualifications which, if met, deems one qualified to engage in a certain

profession. The Board's certification permits a driver to drive on its routes and does not qualify the recipient to drive buses, including school buses, for anyone else.*

The proper inquiry in this case is whether the respondent had a legitimate claim of entitlement to continue to drive on Board of Education routes. This Court in Board of Regents v. Roth, 408 U.S. 564, 577 (1972) held that protected property interests "are defined by existing rules or undertakings that stem from an independent source such as state law-rules or

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* Conversely, respondent's disqualification simply means that he may no longer work on Board of Education routes. He is free to seek employment as a bus driver elsewhere. Although this may implicate protected liberty interests, see, Cafeteria & Restaurant Workers Union, 367 U.S. 886 reh'g denied, 368 U.S. 869 (1961); Paul v. Davis, 424 US 694 (1975), the respondent did not have his liberty claim submitted to the jury in the District Court.

understandings that secure certain benefits and that support claims of entitlement to those benefits". This Court has looked to State law to determine whether a property interest exists, recognizing that a property interest can arise from statute, contract, rules or policies and practices. See, e.g., Bishop v. Wood, 426 U. S. 341 (1976); Perry v. Sindermann, 408 U. S. 593 (1972).

Petitioners submit that in the case at bar there is no statute, contract provision, practice or mutual understanding that would support a legitimate expectation on respondent's part that he should be allowed to continue to drive on the Board's routes.

Accordingly, the Court of Appeals erred in affirming the finding of liability against petitioners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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STEPHEN J. McGRATH,
FAY S. NG,
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August 19, 1986.

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

Stuart Stein v. The Board of Education of the City of New York, Bureau of Pupil Transportation, A.C.J. Transportation Corp., Anthony DiDomenico, and Leonard A. David.

792 F.2d 13(2d Cir. 1986)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1237--August Term, 1985

Argued April 28, 1986
Decided May 22, 1986

Docket No. 86-7139

STUART STEIN,

Plaintiff-Appellee,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, A.C.J. TRANSPORTATION CORP., ANTHONY DIDOMENICO, AND LEONARD A. DAVID,

Defendants,

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, LEONARD A. DAVID,

Defendants-Appellants.

Before:

FEINBERG, Chief Judge,
KAUFMAN and OAKES, Circuit Judges.

The Board of Education and Leonard David appeal from judgment entered by United States District Court for the Eastern District of New York (Eugene Nickerson, Judge), after a jury verdict finding a violation of Stein's procedural due process rights.

Reversed and remanded.

FAY S. NG, Corporation Counsel of the City of New York (Frederick A.O. Schwarz, Jr., Corporation Counsel, Ellen B. Fishman, of counsel), for Defendants-Appellants Board of Education and Leonard David.

PAUL A. SHNEYER, Shneyer & Shen, P.C., New York, for Plaintiff-Appellee Stuart Stein.

KAUFMAN, Circuit Judge:

Stuart Stein was employed as a bus driver by A.C.J. Transportation, Inc. ("ACJ") from 1979 to 1982. The exclusive

business of ACJ was to provide bus transportation for handicapped children as directed by the New York City Board of Education.

By the terms of his written contract with ACJ, Stein could not be discharged from his employment except for just cause. A written agreement between ACJ and the Board of Education, however, provided that ACJ "shall only employ persons of good moral character to serve as vehicle operators." Certification that a vehicle operator had received appropriate training was a prerequisite to a driver operating on a Board of Education route. The agreement further provided that, after determination by the Director of the Bureau of Pupil Transportation that a driver's competency "falls below acceptable standards . . . [ACJ], upon receiving written notice from

the Director to that effect, shall not again employ this operator on any part of the work to be performed hereunder, or on any part of the work the contractor may perform for the Board of Education under any other contract."

In early April, 1982, the Chief of Staff at the Bureau of Pupil Transportation of the Board of Education ("Bureau") received anonymous telephone calls reporting that a school bus driver had fondled himself on the bus. The Bureau asked ACJ to investigate the complaints. On April 2, Anthony DiDomenico, the president of ACJ, reported to the Bureau that a chaperone[1] who rode the bus with Stein had complained that Stein

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[1] The chaperones, or "matrons," were women who assisted the handicapped children during the bus rides.

had exposed himself while driving the bus. The Bureau instructed DiDomenico not to allow Stein to drive on Board of Education routes until a hearing could be held. Accordingly, when Stein returned to the ACJ garage that evening after completing his route, he was informed that he would not be permitted to drive for ACJ in the future. No explanation was given.

On April 3, ACJ sent the Bureau a written report containing allegations by several female chaperones that Stein had made sexual advances to them. One of the chaperones, Maxine Brown, sent a letter to the Bureau alleging that Stein had brought women on the bus "who looked very much like prostitutes," and that Stein had asked Brown to buy marijuana for him. Alarmed by these reports, Leonard David, Director of Compliance for the Bureau, decided to

conduct a hearing. David testified that he instructed a member of his staff to send a notice of hearing to ACJ, with a request that a copy of the notice be forwarded to Stein.

The only notice Stein received, however, was a handwritten note from David with the date and the time of the hearing, and verbal instructions from an employee of ACJ to appear at the hearing office of the Bureau on Monday, April 12, 1982.

Stein went to the April 12 meeting with his union representative. For the first time, Stein was shown the letters written by the chaperones, none of whom were present at the hearing. Stein submitted letters attesting to his good character. Nonetheless, the following day, David informed ACJ that Stein was barred from driving on Board of Education routes

because he fell below the standards of "good moral character" required by the contract between the Board of Education and ACJ.

Shortly thereafter Stein was discharged by ACJ. He filed a grievance with his union, and the matter went to arbitration. Both sides submitted evidence, and the arbitrator declined to overturn the decision by ACJ to fire Stein.

On December 22, 1982, Stein brought an action in federal district court pursuant to 42 U.S.C. § 1983, alleging a deprivation of due process because he did not receive adequate notice or a fair hearing before his disqualification by the Board of Education. Leonard David, the New York City Board of Education, ACJ and DiDomenico were named defendants. After a four-day jury trial, Judge Nickerson charged the jury that "Mr. Stein's job is protected by due process of

law," rejecting defendants' request that the jury be instructed that in New York the decertification of a school bus driver is not a constitutionally protected property right. In addition, the district judge denied defense counsel's requested charges that Leonard David might be entitled to a good faith defense, and that the jury should award only nominal damages if it found that Stein would have been discharged by ACJ even if he had received adequate notice.

In response to four special interrogatories, the jury found Stein had not received adequate notice of the charges against him, but that defendants ACJ and DiDomenico did not conspire with the state to deprive Stein of his constitutional rights. Accordingly, it found only defendants Leonard David and the Board of Education liable for lost wages. Judgment was entered

on January 24, 1986, awarding Stein $15,000 in compensatory damages plus attorneys' fees, and directing the Board of Education to hold a new hearing to determine whether Stein should be permitted to drive school buses on Board of Education routes. Leonard David and the Board of Education now appeal.

DISCUSSION

We turn first to the difficult question whether Stein's continued employment by ACJ is a protected property interest such that the state violated his procedural due process rights when it revoked his certification and caused his discharge. The district judge charged the jury that it was.

For reasons which we present below, we agree.[2]

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[2] In denying defendants' motion for summary judgment on the issue whether Stein had a constitutionally protected property interest, Judge Nickerson relied on the Supreme Court holding in Greene v. McElroy, 360 U.S. 474 (1959). Greene was an engineer who worked for a private contractor on a military installation. After working for the same company for many years, the employee lost his job when the United States Department of Defense revoked the security clearance giving him access to classified documents. The Defense Department had received information that the employee was sympathetic to communism, and on the basis of that information revoked the engineer's security clearance without affording him a hearing. When his employer, having no other choice, was forced to discharge him, Greene was unable to procure employment elsewhere in his field.

The Court, noting that the procedures used to revoke the petitioner's security clearance were not explicitly authorized by the President or Congress, held that the method used to determine petitioner's clearance status did not comport with "traditional ideas of fair procedure." 360 U.S. at 508.

The next year, the Supreme Court

(Footnote Continued)

(Footnote Continued)
demonstrated the limited scope of the Greene decision in Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO, et al. v. McElroy, 367 U.S. 886 (1961). In Cafeteria Workers, the petitioner was a cook who worked for a private catering service on a military installation. Like the engineer in Greene, the cook's security clearance was revoked without a hearing. In Cafeteria Workers, however, the Court held that the revocation of the cook's security clearance without a hearing did not violate the Due Process Clause of the Fifth Amendment. The Court noted that Greene had failed to reach the constitutional issue whether an employee had a protected property interest in his security clearance status. Moreover, it found that the explicit Congressional authorization absent in Greene was in fact present in Cafeteria Workers. The Court went on to hold that the petitioner, who had been offered but had refused employment by her company at locations outside the military installation, had been denied only "the right to work at one isolated and specific military installation." 367 U.S. at 896. Accordingly, it found that in light of the Government's important role as proprietor of a military establishment, notice and hearing were not constitutionally required.

Because both Greene and Cafeteria

(Footnote Continued)

(Footnote Continued)
Workers are decisions carefully tailored to their facts, it is difficult to discern which is the rule and which the exception. See Friendly, Some Kind of Hearing, 123 U.Pa.L.Rev. 1263, 1273 (1975). While the majority on Cafeteria Workers believed that fair notice and a hearing were not required when the cook's security clearance was revoked, the Court was strongly influenced by the fact that the cook "remained entirely free to obtain employment as a short-order cook or to get any other job, either with [her present employer] or with any other employer." 367 U.S. at 896. Moreover, the Court found that the revocation of clearance did not "bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity." 367 U.S. at 898.

In these respects Cafeteria Workers differs from the case before us now. Stein's disqualification as a school bus driver for the Board of Education meant that he could not transport students for the Board of Education under the current contract or any other contract ACJ might have with the Board. We have previously held that heightened procedural safeguards are required when a government agency seeks to foreclose further relations with a party, compared to the mere refusal to renew a

(Footnote Continued)

In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), the Supreme Court wrote:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim to entitlement to it.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

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(Footnote Continued)
particular contract or set of contracts. Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252, 1259-60 (2d Cir. 1975). Moreover, Stein's disqualification was based upon a written finding that he fell below the standards of "good moral conduct," thereby tainting his chance of obtaining other employment involving the transportation of students. See Birnbaum v. Trussel, 371 F.2d 672, 679 (2d Cir. 1966); Huntley v. Community School Board of Brooklyn, 543 F.2d 979, 984-86 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977), appeal after remand, 579 F.2d 738 (2d Cir. 1978).

> understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577.

In Roth, the Court held that a nontenured state university teacher holding a one-year appointment did not have a "liberty" or "property" interest in continued employment at the school. In the case before us, however, Stein's contract with ACJ provided that Stein would not be discharged except for "good cause." The "good cause" for the discharge was supplied by the state, which by disqualifying the employee foreclosed him from doing his job. Accordingly, Stein's "claim of entitlement" arose from his contract with ACJ.

We have previously noted that "liberty" or "property" protected by due process need

not always flow from guaranty under state law or the Constitution. Huntley v. Community School Board of Brooklyn, 543 F.2d 979, 986 n.8 (2d Cir. 1976), cert. denied, 430 U.S. 929 (1977), appeal after remand, 579 F.2d 738 (2d Cir. 1978). Where the independent source of a property interest is a private contract, the state cannot transgress on the claim of entitlement to continued employment without due process of law.[3]

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[3] We do not address appellants' contention that had Stein been employed directly by the Board of Education, he would not have a constitutionally protected right in his certification unless he was a civil service employee or his termination was otherwise proscribed by statute or contract. Rather, we simply hold that Stein's contract with ACJ gave rise to a legitimate claim of entitlement to his continued employment, and his disqualification as a certified bus driver by the Board of Education was state action that deprived him of that property.

We need not reach the broad question whether Stein's certification as a vehicle operator by the Board was itself a property interest protected by the constitutional safeguards of due process. Although certification of a driver to work on Board of Education routes might bear some comparison to licensing of professions by the state, see, e.g., Bell v. Burson, 402 U.S. 535, 539 (1971) (suspension of driver's license invokes procedural due process protections when it prevents pursuit of chosen employment); Keney v. Derbyshire, 718 F.2d 352, 354 (10th Cir. 1983) (medical license is constitutionally protected property right); Herz v. Degnan, 648 F.2d 201, 208 (3d Cir. 1981) (license to practice psychology is constitutionally protected property interest), our holding in this case rests on the narrower ground that Stein had a protected

property interest in his continued employment with ACJ.

The New York case of Morales v. Board of Education, 125 Misc.2d 310 (Sup. Ct. Nassau Co. 1984), comports with our holding. In Morales, a school district decertified a bus driver who worked for a private contractor. The plaintiff, however, continued to work for her employer and could have driven for other school districts with which the company contracted. Here, we hold that Stein's protected property interest lies in his continued employment by ACJ, not in the certification itself. The court's finding in Morales that the plaintiff suffered no deprivation of property because she was not discharged, therefore, does not conflict with our holding.

Having correctly determined that Stein had a protected property interest in his

continued employment, the district judge instructed the jury that due process requires the state to provide adequate notice and a hearing before it expropriates the property of an individual. Accordingly, the jury found that Stein had not received adequate notice of the nature of the charges against him, and awarded Stein $15,000 in compensatory damages against Leonard David and the Board of Education. David contends, however, that the district judge erroneously refused to instruct the jury that they could assess no damages against David if they found him to have acted in good faith in his actions with respect to Stein. We disagree.

Qualified or "good-faith" immunity is an affirmative defense that shields government officials "from liability for civil damages insofar as their conduct does not violate

clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In Harlow, the Court held that in deciding a motion for summary judgment a judge may determine whether the law was clearly established at the time an action occurred, thereby measuring the objective reasonableness of an official's conduct. 457 U.S. at 818. To the extent it eliminated the subjective intent element from the good-faith immunity defense, Harlow implicitly overruled the Court's prior holding in Wood v. Strickland, 420 U.S. 308, 322, reh'g denied, 421 U.S. 921 (1975) (good-faith immunity applies if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if

he took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ." (emphasis added)). Accordingly, the Court rejected preliminary holdings that the good-faith immunity defense required a factual injury into whether an official harbored a subjective intent to violate a person's civil rights. See, e.g., O'Connor v. Donaldson, 422 U.S. 563, 577 (1975); Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978), cert. denied, 439 U.S. 912 (1978); Duchesne v. Sugarman, 566 F.2d 817, 832-33 (2d Cir. 1977).

By omitting the subjective element of the test for "good-faith" immunity, the Supreme Court sought to minimize disruptive judicial inquiries into the motives of government officials exercising discretion in their duties. 457 U.S. at 816-17. Accordingly, whether the law on a particular

issue is clearly established is now a question of law to be determined by the court.

We find, however, that this issue was not properly raised in the district court. In their motion for summary judgment before trial, appellants argued only that David was protected by the doctrine of absolute immunity in his role as a hearing officer--an argument that was rejected by the trial judge and is not raised on appeal. After presentation of all the evidence at trial, appellants requested the judge charge the jury on the good-faith immunity defense. As we have already noted, however, this issue is not appropriate for a jury determination, and the district judge correctly declined to

include it in the jury instructions.[4] David therefore waived his right to raise the good-faith immunity defense.

We now turn to the final issue on appeal, whether the district judge erred by refusing to instruct the jury that only nominal damages were appropriate if they found Stein would have been discharged by ACJ even if he had received proper notice from the school board.

In Carey v. Piphus, 435 U.S. 247 (1978), the Supreme Court held that students who had been suspended from

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[4] We decline to construe appellants' requested jury charge as an application to the district court for a directed verdict for David based on the good-faith immunity defense. See Mallick v. International Brotherhood of Electrical Workers, 644 F.2d 228, 234 (3d Cir. 1981); Lowenstein v. Pepsi-Cola Bottling Co. of Pennsauken, 536 F.2d 9, 11-12 (3d Cir. 1976).

school without a hearing could receive only nominal damages if the jury found they would have been suspended even if their procedural due process rights had not been violated. The Court stated that a damage award for the suspensions where the failure to accord procedural due process was not the cause of the suspensions would be a windfall to the plaintiffs. 435 U.S. at 260. Acknowledging that mental and emotional distress caused by a denial of due process is compensable pursuant to § 1983, the Court held that proof of such injury nonetheless had to be shown to justify an award of damages. 435 U.S. at 264.

Here, the special verdict delivered by the jury clearly indicated that $15,000 was awarded to Stein to compensate for lost wages because the Board of Education and Leonard David failed to give Stein adequate

notice. The jury did not, nor were they instructed to, determine whether Stein would have been discharged by ACJ regardless of the actions of the state. We recognize that such a determination may involve the taking of additional evidence and create a further imposition on the district court. Nonetheless, we think the Supreme Court's directive in Carey is clear and unequivocal. See Huntley v. Community School Board, 579 F.2d at 740. The district judge, therefore, should have instructed the jury to award only nominal damages if it found Stein would have been discharged by ACJ even had he received adequate notice of his disqualification proceeding from the state.

CONCLUSION

Accordingly, the judgment is reversed and the case remanded to the district court for proceedings consistent with this opinion.[5]

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[5] We believe the issue of nominal damages is "sufficiently distinct from the other issues that a separate trial may be had without injustice." Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740, 756 (2d Cir. 1984). Accordingly, the new trial should be limited to the damages issue. See Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931); Akermanis v. Sea-Land Service, Inc., 688 F.2d 898, 906-07 (2d Cir. 1982), cert. denied, 461 F.2d 927 (1983); Fed.R.Civ.P. 59(a).

APPENDIX B

Memorandum and order of the United States District Court for the Eastern District of New York entered March 20, 1984.

Stuart Stein v. The Board of Education of the City of New York, Bureau of Pupil Transportation, A.C.J. Transportation Corp., Anthony DiDomenico, and Leonard A. David.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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STUART STEIN,

Plaintiff,

-against-

BOARD OF EDUCATION OF THE CITY OF NEW YORK, BUREAU OF PUPIL TRANSPORTATION, A.C.J. TRANSPORTATION CORP., ANTHONY DIDOMENICO, and LEONARD A. DAVID,

Defendants.

MEMORANDUM AND ORDER
82 C 4117

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New York, New York
for defendants A.C.J. Transportation Corp.
and DiDomenico

NICKERSON, District Judge

Plaintiff brought this action under 42 U.S.C. §1983 alleging that defendants deprived him of property--his livelihood--without due process of law in violation of the Fourteenth Amendment of the United States Constitution and Article I of the New York State Constitution. He also alleges, in a pendent state claim, that defendant DiDomenico libeled him. Plaintiff seeks reinstatement as a bus driver for defendant A.C.J. Transportation Corp. (A.C.J.), damages for lost wages, punitive damages, and declaratory and injunctive relief.

All of the defendants move, and plaintiff cross-moves, pursuant to Rule 56 for summary judgment.

The facts, as claimed by plaintiff, are as follows. In 1979, A.C.J. hired plaintiff, pursuant to a written contract between A.C.J. and plaintiff's union, as a school bus driver of handicapped children. A.C.J.'s only business is the transportation of handicapped children under a contract with the New York City Board of Education (the Board). The agreement between A.C.J. and the Board provides that before drivers are permitted to operate a school bus they must be certified as meeting the Board's standards, among others, of "good moral character."

On April 2, 1982, A.C.J. told plaintiff that he could no longer work for A.C.J. He was not given the reason.

On April 3, 1982 defendant DiDomenico, the president of A.C.J., drafted a letter, which was signed by a company dispatcher, to defendant Bureau of Pupil Transportation (the Bureau) recounting incidents of sexual harassment by plaintiff allegedly reported by several bus matrons and parents. On April 5, 1982 Maxine Brown, who was assigned to plaintiff's bus as a matron only on the previous March 29, wrote to the Bureau claiming that plaintiff on one occasion had "two women who looked very much like prostitutes" standing in his bus and speaking with him; that on several occasions he fondled himself; and that three times he asked Ms. Brown to purchase marijuana for him.

On April 8, 1982 plaintiff was told by an A.C.J. employee to go to the Bureau offices on April 12. He was given no

further notice, oral or written, of the matters to be discussed. On that date defendant David, the Director of Contract Compliance for the Bureau, held a hearing at which plaintiff was confronted for the first time with the charges contained in DiDomenico's and Brown's letters. None of the complaining matrons or parents was present at the hearing.

In a letter dated April 13, 1982 David delivered his written decision. Relying on the letters, complaints made to him personally outside of the hearing, and plaintiff's demeanor at the hearing, David barred plaintiff from driving on Board routes on the ground that he fell below the standard of "good moral character" described in Section XVII of A.C.J.'s contract with the Board, titled "Vehicle Operator Standards." That section provides that the bus company,

on receiving written notice from the Board that a driver is found to have fallen below the required standards, shall no longer employ that driver on Board routes. Plaintiff was not advised in writing of his right to appeal.

A.C.J. discharged plaintiff, having no work for him other than Board work. The actual date of discharge--April 2 or April 13--is disputed.

Plaintiff filed a grievance through his union under its collective bargaining agreement with A.C.J. Following a hearing at which plaintiff and Brown testified, an arbitrator declined to overturn A.C.J.'s decision to discharge plaintiff.

Plaintiff then brought this action alleging that the charges against him were untrue, that by not giving him advance written notice of the charges against him the

defendants rendered him unable to prepare his defense, and that he was not informed of his rights to be represented by counsel, to present witnesses, and to confront his accusers.

The court will address separately each of defendants' arguments.

I

The Board claims that plaintiff has not alleged the existence of an official Board policy or custom that caused the alleged violation of due process. A municipality cannot be held liable under section 1983 for an action of an employee, here the defendant David, on a theory of respondeat superior. Monell v. Department of Social Services, 436 U.S. 658 (1978). Plaintiff must show that the municipality maintained or practiced an unconstitutional policy or custom and that that policy or custom caused the violation.

Dominguez v. Beame, 603 F.2d 337, 341 (2d Cir. 1979), cert. denied, 446 U.S. 917 (1980).

The court does not accept the Board's argument. Plaintiff directs his challenge at the Board's policy of not providing adequate notice of the hearing. The Board also argues that it hired A.C.J. and not the company's drivers, and that therefore only A.C.J. was responsible to notify plaintiff. However, a private act may give rise to a right to receive procedural due process from a government entity where the consequent deprivation of property results from a government act. An example is where the government's revocation of security clearance results in a discharge from private employment. Greene v. McElroy, 360 U.S. 474 (1959). Here, the contract between A.C.J. and plaintiff's union providing that

plaintiff could not be discharged except for good cause gave him a legitimate expectation that a state action would not cause his discharge without his being afforded due process. Indeed, it would be incongruous for the Board to entertain charges at a hearing on an A.C.J. employee's conduct and to make a decision against him, thereby causing his discharge, and yet not to be responsible for providing to the employee notice of the charge filed with it.

David asserts in his affidavit that he or a clerk from his office sent two copies of written notification to A.C.J., presumably so that one copy would be forwarded to plaintiff. He also believes that the standard notice informs parties of their rights to be represented by counsel. Plaintiff claims to have received no such notice. The court need not address now the question of

whether the notice allegedly sent was adequate to inform plaintiff of the matters at stake.

Plaintiff has stated a claim under section 1983 and has raised triable issues as to what process he was afforded and whether it comported with due process.

II

A.C.J. claims that it was not required to afford procedural due process since the dismissal of plaintiff was a private act, and that its contract with the Board required the dismissal following the Board's determination.

For reasons noted, plaintiff has a section 1983 cause of action against the government defendants. The issue here is whether A.C.J.'s and DiDomenico's actions can be fairly seen as "state action" or as done "under color of state law," so as to make them subject to a suit under section

1983. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

The fact that A.C.J.'s business consisted entirely of contracts with the city does not make its acts government acts. Id. at 841. However, A.C.J.'s decision to discharge plaintiff was the direct result of, indeed, was compelled by, a governmental action. See Adickes v. S. H. Kress and Company, 398 U.S. 144, 170-71 (1970). The joint participation here of the Board and A.C.J. in allegedly depriving plaintiff of a property right without due process of law is sufficient to hold A.C.J. See id.; Lugar v. Edmondson Oil Co., 457 U.S. 922, 931 (1982).

For much the same reasons, plaintiff has stated a claim for conspiracy to violate his civil rights. Such a claim must allege with some degree of particularity the acts of

defendants reasonably related to the alleged conspiracy. Chodos v. Federal Bureau of Investigation, 559 F. Supp. 69, 72 (S.D.N.Y.), aff'd, 697 F.2d 289 (2d Cir. 1982). Here plaintiff has clearly enough alleged unlawful acts of cooperation between A.C.J. and the Board resulting in the alleged constitutional deprivation.

III

Defendant David contends that there is no claim against him because his quasi-judicial function as a hearing officer entitled him to absolute immunity from liability for damages. His task was to enforce contracts between the Board and school bus companies, and that included ensuring that vehicle operators met the requisite standards. He had authority to hold hearings on complaints indicating that particular drivers were not of good moral

character, to assess penalties against companies and to bar them from using unsuitable drivers on Board bus routes. He says his position was equivalent to that of a first-level judge.

The question is whether David's functions and the nature of the Board's hearing are such as to require the grant to him of absolute immunity under the standards adopted in Butz v. Economou, 438 U.S. 478 (1978).

Judges are given absolute immunity to assure the performance of their judicial functions "without harassment or intimidation." The nature of their responsibilities rather than their "particular location" is critical. Therefore, in deciding whether a hearing officer should enjoy the same immunity, the court must compare his functions with those of a judge. Id. at 512.

Such an evaluation led the Supreme Court to hold that federal administrative agency hearing examiners are absolutely immune. Id. at 513.

If the Board's hearing held by David provided the requirements of a formal judicial proceeding, he may fairly be said to have assumed a judicial function. These requirements include: (1) a proceeding that is adversary in nature; (2) a hearing officer not subject to the supervision of those engaged in investigative or prosecutorial duties; (3) the opportunity for the accused party to offer evidence on his behalf; (4) a duly recorded record constituting the exclusive record for the decision; and (5) the proceedings structured so as to assure the officer's independent judgment. Ward v. Johnson, 690 F.2d 1098, 1105-06 (4th Cir. 1982) (en banc).

In the Ward case the Fourth Circuit found that the challenged prison disciplinary proceedings were such as to afford the hearing officers absolute immunity. But there exacting guidelines governed the proceedings and ensured the insulation of hearing officers and the granting to inmates the rights to counsel, confrontation and cross-examination of their accusers, and presentation of evidence in their own behalf. 690 F.2d at 1106-08. Other inmate cases have declined to grant such immunity, where such requirements were absent. See, e.g., Hilliard v. Scully, 537 F. Supp. 1084 (S.D.N.Y. 1982). Each situation must be examined individually.

The Board's hearing did not meet the conditions set forth in the Ward case. David states that he held the hearing to "further investigate the various charges." Prior to

the hearing his office received complaints and then asked for written statements. In determining that plaintiff fell below Board standards, he relied on complaints made personally to him outside of the hearing in addition to the letters introduced at the meeting and plaintiff's demeanor there. Davis was thus involved in the investigative process and considered matters outside the record. Furthermore, there is a dispute as to whether plaintiff was properly advised of the charges and of his rights. Under the circumstances the court may not now determine that David is immune.

The court need not decide whether an injunction may lie against David and the Board, except to note that the argument is incorrect that in the event of a decision in plaintiff's favor, the court may only direct A.C.J. to reinstate plaintiff. Plaintiff seeks

to enjoin the Board and David from further barring him from employment on Board routes without according him procedural due process.

IV

Defendants argue that because there are adequate state remedies available, plaintiff has no section 1983 claim. They point out that, although there was "no formal appeals process," plaintiff could have appealed David's decision through the Board of Education's system of appellate review, going as far as the State Commission of Education. Board of Education Bylaws, art. 7; N.Y. Educ. Law §310 (McKinney 1979). David claims that he informed plaintiff orally of the right to appeal. Instead of appealing, plaintiff asked for a hearing before his own union and then failed to appeal the arbitrator's decision.

Defendants rely on the Supreme Court decision in Parratt v. Taylor, 451 U.S. 527 (1981). That case concerned the negligent deprivation of a prisoner's property by the random and unauthorized act of a state official. The Court held that all the process due was provided by the state's tort claims procedure.

In a subsequent case the Supreme Court distinguished the facts of the Parratt case from the situation involving a deprivation of property as the result of some established state procedure, and noted that the Parratt case was not designed to reach the latter situation. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982). See also Holmes v. Ward, 566 F. Supp. 863 (E.D.N.Y. 1983). Here, plaintiff challenges the Board's established procedure whereby it determines whether a driver's behavior meets

its standards. Plaintiff has raised genuine issues as to whether he was accorded constitutionally adequate procedural safeguards before being deprived of his livelihood. Whether or not he was properly informed of the right to appeal through the Board and whether or not that would have been sufficient to provide the process due plaintiff are two such issues.

The union grievance proceeding addressed A.C.J.'s decision to discharge plaintiff and could not have redressed the possible procedural infirmities of the Board's hearing.

V

Defendants claim that the doctrine of collateral estoppel bars plaintiff from relitigating the issues raised here because they were already fully litigated at the

Board hearing and at the arbitration proceeding.

Under the law of New York State, there are two requirements for the invocation of collateral estoppel. First, there must be an identity of issue, necessarily decided in the prior action and decisive of the present action. Second, there must have been a full and fair opportunity to contest the decision now claimed to be controlling. Langert v. Festa, 563 F. Supp. 692, 695 (E.D.N.Y. 1983). Federal law has essentially the same requirements. Id.

The court finds that the issue of denial of due process was not fully litigated nor decided in the prior proceedings. The Board was not a party to the arbitration proceeding, and the arbitration did not purport to decide whether plaintiff had received due process before the Board.

However, if defendants were to show that plaintiff received all the process due him at the arbitration proceeding, he would be estopped from contesting that he fell below the standard of "good moral character" set out in the contract between A.C.J. and the Board. In that event, plaintiff would be entitled only to nominal damages for the Board's denial of due process.

VI

DiDomenico argues that the state libel claim against him should be dismissed. The claim is based on the April 3, 1982 letter DiDomenico wrote, at the request of the Bureau, documenting the complaints made about plaintiff.

Under New York State law, absolute immunity applies only to proceedings in court or before an officer with attributes similar to a court. Toker v. Pollak, 44 N.Y.2d 211,

219 (1978). As discussed above, taking the plaintiff's presentation of facts as true, the Board's proceedings were not functionally comparable to judicial proceedings so as to provide its participants with absolute immunity.

DiDomenico's communication, however, is entitled to a qualified privilege. That privilege arises "whenever a person makes a bona fide communication upon a subject in which he has a legal, moral or social duty to speak and the communication is made to a person having a corresponding interest or duty." Kilcoin v. Wolansky, 75 A.D.2d 1, 428 N.Y.S.2d 272 (2d Dep't 1980). Plaintiff does not dispute the existence of the privilege. He claims DiDomenico's statement was motivated by malice. Plaintiff alleges that DiDomenico had no personal knowledge of the complaints and that three of the

complaining matrons did not work for A.C.J. during 1982. Plaintiff also says that there was an ongoing dispute regarding overtime pay between himself and DiDomenico, who accused plaintiff of "stealing time." Plaintiff is entitled to try and prove personal spite on DiDomenico's part.

VIII

In determining whether plaintiff was or was not denied procedural due process the court must take into account the seriousness of the charges against plaintiff and the fact that defendants had a heavy responsibility to provide for the welfare of the children and matrons with whom plaintiff was in daily contact. Mathews v. Eldridge, 424 U.S. 319 (1976). But an individual faced with loss of property is entitled to such procedural safeguards as are due him.

There are too many disputed issues of fact--most importantly, the issues of what process was actually afforded plaintiff and whether those measures in fact provided the process he was due--to permit a final determination now.

Plaintiff has not shown as a matter of law that he was denied due process.

The motions for summary judgment are denied. So ordered.

Dated: Brooklyn, New York
March 19, 1984

Eugene H. Nickerson, U.S.D.J.

APPENDIX C

Relevant Portion of Instruction to the Jury (E.D.N.Y., 1985)

Stuart Stein v. The Board of Education of the City of New York, Bureau of Pupil Transportation, A.C.J. Transportation Corp., Anthony DiDomenico, and Leonard A. David.

All right. As to the third element I have already explained to you that the Fourteenth Amendment provides without due process of law, and the plaintiff has legal right at all times not to be deprived without due process of law, of property secured or protected by the constitution or laws of the United States.

Mr. Stein's job is a property interest which is protected by due process of law.